No. 20,807

# In the United States Court of Appeals for the Ninth Circuit

LESLY COHEN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court for the Northern District of California**

## BRIEF FOR APPELLEE


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## JURISDICTION

Jurisdiction is invoked by appellants under the provisions of Section 1291 and 1294(1) of Title 28, United States Code. Jurisdiction was invoked by the Government in the District Court, Northern District of California, under the provisions of Section 1084 (a), Title 18, United States Code.

## STATEMENT OF THE CASE

Inasmuch as appellant's statement of the case is not complete, an amplification and extension of the factual background is provided.

Appellant was indicted on December 11, 1963, in a nine-count indictment charging violations of Section 1084(a), Title 18, United States Code. (R. 2-6).* Counts one, two, three, four, five, six, eight and nine alleged that the appellant, being engaged in the business of betting and wagering, utilized interstate telephone communication facilities between the Northern District of California, and the District of Nevada to transmit wagers on certain sporting events. Count seven of the indictment alleged that the appellant, while engaged in the business of betting and wagering, utilized interstate telephone communication facilities between the previously mentioned districts for the transmission of wagering information, such information being communicated for the purpose of assisting in the placement of a wager.

On January 23, 1964, appellant made a motion to suppress evidence which he alleged was obtained in violation of constitutional rights. (R. 11-13). The motion papers contained unsubstantiated charges that the Government tampered with appellant's mail and intercepted his telephone conversations. The only support for the motion is comprised in affidavit filed on January 29, 1965, by appellant's counsel. (R. 57-58). This affidavit asserts that on April 22, 1963, a letter was mailed to the appellant by appellant's counsel, and then speculates that, "this letter presumedly was intercepted by agents of the Internal Revenue Service in connection with the investigation of this defend-

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* References are to the Transcript of Record (R.), and to the record of trial (Tr.).

ant." The affidavit also refers to the interview of unidentified Government witnesses by appellant's counsel and then infers that, "the content of . . . questions (addressed to such witnesses by Internal Revenue Service agents) was such that in order to ask the questions, . . . agents must have been familiar with the content of correspondence and with the content of the telephone conversations to which the questions referred." With these vague and indefinite conclusions of fact counsel for appellant in effect stated that he was told what others said they were asked, but does not even state what he was told they were asked. Not a single question or answer is mentioned in the affidavit.

In a Memorandum Opinion and Order filed April 21, 1965, United States District Court Judge George B. Harris denied appellant's motion without permitting oral testimony in support of the motion. (R. 59-63). Judge Harris' opinion noted that the vague assertions in the affidavit executed by appellant's counsel, were patently insufficient to create an issue in view of the categorical denials supplied in affidavit form by the Office of the United States Attorney (R. 28-30); and United States Post Office employees responsible for handling appellant's mail. (R. 51-56). The opinion also noted that the motion represented, "generalizations and blanket charges," that it was, "insufficient on its face," and that mail watches similar to the one employed by the Government in this case have been approved by well considered case authorities.

On October 5, 1965, the jury returned a verdict of guilty on Counts Seven and Nine of the indictment,* and on November 30, 1965, the Trial Court denied a motion for a new trial and judgment of acquittal.

As noted, Count Seven relates to the transmission of wagering information as distinct from the transmission of wagers. The count refers to information transmitted during the football season of 1962, from Las Vegas, Nevada to San Francisco, California, "for the purpose of assisting in the placement of a wager on a football game in which the San Francisco Forty-Niners participated . . ." (R. 5). Count Nine relates specifically to the transmission of a wager, on or about September 15, 1962, from Las Vegas, Nevada to San Francisco, California, on a prize fight in which fighters Sonny Liston and Floyd Patterson participated. (R. 6).

Appellant contended prior to trial that Count Seven was duplicitous by reason of facts set forth in a Bill of Particulars filed by the Government on February 7, 1964. (R. 31-32); and an Amended and Corrected Bill of Particulars filed on February 27, 1964. (R. 34-35). With respect to these counts appellants Motion for a Bill of Particulars requested, "the name of the individual or individuals who allegedly wagered on the sporting events mentioned in each count. . . ." (R. 9). In direct response to this specific request the Government apprised the appellant through the medium of the Amended and Cor-

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* Counts Two, Three, Four, and Six were dismissed at the close of the Government's case on motion of the Government.

rected Bill of Particulars that the witnesses Adolph P. Schuman and Raymond Syufy would testify concerning the charges contained in Count Seven. The duplicity contention was raised because the testimony of two witnesses related to the offense charged in Count Seven. The motion was denied in a Memorandum opinion filed on May 8, 1964. (R. 37).

## STATEMENT OF FACTS

During the course of the Government's presentation ten witnesses were called to testify. The testimony of one of these witnesses, Henry Wayne Stead, was stricken at the close of the Government's case with an instruction to the jury to disregard his testimony. (Tr. 511B). It is clear from the trial transcript that testimony elicited from the nine remaining witnesses was more than sufficient to establish the elements of proof required by the terms of Section 1084(a), Title 18, United States Code.

At the outset it should be noted that a portion of this proof established clearly that the appellant conducted a sports betting operation at the Saratoga Sports Book, a betting establishment located in Las Vegas, Nevada and licensed to conduct wagering activity in that city. (Tr. 163). The existence of the mentioned gambling establishment and the appellant's close connection with it is not controverted.*

The following is a summary of significant testimony:

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* Appellant's Opening Brief, p. 3.

**(a) Testimony of Adolph P. Schuman**

The witness Adolph P. Schuman provided a substantial portion of the testimony relating to Count Seven and Nine. His testimony was also pertinent with respect to the general element of proof that the appellant was a person, "engaged in the business of betting or wagering" as that phrase is utilized in Section 1084(a).

This witness testified that he made several bets on professional football games during the fall of 1962 with the appellant. (Tr. 95: 17-25). In testimony just prior to that cited, this witness stated that when betting with the appellant he received information from him which enabled him to decide how he would bet. In this regard the witness stated, "I would hardly make a bet before I found out what the price was." (Tr. 194: 17-4 n.p.*). He testified that he was particularly interested in the San Francisco Forty-Niners during the 1962 football season, and that not less than two telephone bets on the Forty-Niners were made by him with the appellant during the course of telephone calls to the appellant in Las Vegas from the San Francisco area. (Tr. 273: 19-14 n.p.). He then testified that prior to making bets on the Forty-Niners with the appellant he asked for and received information concerning the odds relating to the games. (Tr. 274: 15-21). During the course of cross-examination on this point the witness testified that he received odds on the 1962 Forty-Niner football games from the appellant over the course of

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* Next page of transcript.

the entire football season. (Tr. 258: 25-2 n.p.). In addition to the bets made on the Forty-Niners from the San Francisco area, this witness also testified that he placed some bets on the Forty-Niners when he was in Las Vegas. (Tr. 277: 9-11). His testimony presents no ambiguity with respect to the fact that he made telephone bets on the Forty-Niners from the San Francisco area. It is noted that with respect to the latter point the witness Schuman stated that only one of the 1962 Forty-Niner bets was placed in Las Vegas, and that other betting on this team was carried on over the telephone from the San Francisco area. (Tr. 196: 7-17).

The witness testified positively that all of the bets which he made during the fall of 1962 were made with the appellant, and that these bets came to a total of six or seven. (Tr. 198: 25-7 n.p.). Of this total about five were placed over the telephone from the San Francisco area. (Tr. 199: 8-13).

With respect to Count Nine, the witness Schuman testified that he bet on the Patterson-Liston fight in 1962, and that the bet was placed over the telephone from San Francisco to the appellant who was in Las Vegas. He also recalled that he was in the City of San Francisco at the time of the fight and that he saw the fight on television at the Golden Gate Theater in San Francisco. (Tr. 209: 7-6 n.p.). When asked on redirect examination whether he made the bet from Hillsborough, California, as distinguished from San Francisco, California, the witness replied that his recollection was that it was made with the

appellant from the area or vicinity of San Francisco. (Tr. 274: 22-4 n.p.; Tr. 276: 15-5 n.p.).

With respect to other specific betting activity with the appellant the witness Schuman testified that he made a series of bets on World Series baseball games in 1962. (Tr. 192: 1-14; Tr. 194: 10-13; Tr. 194: 17-4 n.p.). He also testified concerning other telephone bets on professional football placed with the appellant (Tr. 196: 18-7 n.p.; Tr. 198: 12-16); and other bets on prize fights. (Tr. 199: 14-16; Tr. 200: 4-17; Tr. 201: 11-14; Tr. 201: 20-7 n.p.).

With regard to the telephone procedure used, the witness testified that when calling from his office telephone in San Francisco, he would request his telephone operator to reach the appellant specifically, and that his operator would place the call to Las Vegas for him. (Tr. 203: 10-12; Tr. 203: 19-5 n.p.; Tr. 205: 1-9). This witness also testified that when he phoned the appellant from his home he would dial long distance to Las Vegas and ask for the appellant specifically and that he did not dial direct. (Tr. 205: 10-17).

The witness stated that bets were settled personally with the appellant at the end of the season in Las Vegas. (Tr. 275: 15-18; Tr. 275: 23-3 n.p.). However, the witness testified that there was no actual settlement in 1962. Their pattern of betting that year resulted in each breaking even. (Tr. 251: 11-7 n.p.).

On cross-examination the witness testified that in 1962 he may possibly have placed calls to the appellant for betting purposes from Los Angeles or New

York. However, he noted that he was definitely sure that some of the wagering calls to the appellant were made to him from the San Francisco area or the Northern District of California. (Tr. 256: 11-4 n.p.; Tr. 257: 8-12).

**(b) Testimony of Raymond Syufy**

The testimony of Raymond Syufy, like that of the witness Schuman, was extremely persuasive in connection with Count Seven. It was also meaningful in regard to proof that appellant was engaged in the business of betting and wagering.

From the betting practice employed by this witness, the jury could logically have inferred the witness would not have bet with the appellant without first receiving odds or wagering information from the appellant. (Tr. 328: 19-12 n.p.). With respect to the 1962 football season, the witness recalled betting on the East-West game held at Kezar Stadium in the San Francisco area. He recalled phoning the bet to "the Las Vegas number" (Saratoga), from the San Francisco area, and then going out to see the game. (Tr. 333: 24-18 n.p.). Of particular significance with respect to Count Seven is the fact that he also recalls making a bet on a San Francisco Forty-Niner football game in a similar fashion then going out to see the game. (Tr. 335: 24-9 n.p.; Tr. 336: 24-7 n.p.).

This witness was particularly recalcitrant and hostile. However, upon examination of his testimony it is apparent that he produced important details of evidence which tended to establish the guilt of the appel-

lant. Syufy testified that he knew the appellant as an individual connected with the Saratoga Sports Book in Las Vegas and also that the appellant was the only person that he knew at the Saratoga by name. (Tr. 330: 21-11 n.p.). This testimony to the effect that the appellant was the only person that the witness Syufy knew at the Saratoga Sports Book by name becomes extremely material in light of other testimony from him to the effect that the appellant was the only person he settled with in connection with his betting with the Saratoga Sports Book.

With respect to the settlement of his wagers, Syufy testified that he had a discussion with the appellant early in 1962 and that as a result of this conversaton he arranged to settle gambling debts when he (Syufy) was in Las Vegas. The witness also stated in this regard that neither he nor the appellant were concerned about receipt of money owed to each other. (Tr. 365: 6-15; Tr. 366: 8-16; Tr. 367: 4-5 n.p.). He characterized his account with him as a "running tab." (Tr. 346: 6-10).

The witness Syufy specifically recalled two settlements made in 1962 relative to the betting arrangement described. (Tr. 314: 9-17). He testified that on the last occasion he left money for the appellant "at the cashier's cage" of the Riviera Hotel in Las Vegas. (Tr. 316: 1-10; Tr. 317: 10-23; Tr. 359: 2-16). This settlement included bets made from San Francisco to Las Vegas as well as others. The settlement was described as occurring in the latter part of 1962. (Tr. 357: 13-20 n.p.).

The witness also testified concerning a 1962 settlement which took place in the "Saratoga Sports Club." He identified the appellant in the courtroom as being the specific individual he settled with on that occasion. (Tr. 315: 8-25; Tr. 360: 10-8 n.p.). This settlement also included interstate bets as well as those made in Las Vegas. (Tr. 361: 9-11). After further questioning he stated that on this occasion the money may have been given to one of the appellant's assistants (Tr. 364: 3-9); and that the settlement related to a "running tab" covering a period of eight or ten months of wagering in 1962. (Tr. 364: 10-17).

Syufy indicated that he usually bet on weekends during the football season and that he bet on both college and professional games as well as some baseball games. (Tr. 348: 2-19). He stated that in 1962 and 1963 he placed calls to the Saratoga in Las Vegas from San Francisco (Tr. 311: 13-4 n.p.; Tr. 309: 15-19; Tr. 331: 18-4 n.p.); that he identified himself by saying, "This is Ray," (Tr. 310: 12-14), and that during the course of the conversation he placed bets. He recalled the conversations were unusual in that they lasted only two or three seconds. (Tr. 323: 7-13). In this regard he testified that, " . . . the conversation was not a lengthy conversation but a very short two or three second conversation where you made your wager and the party hung up immediately." (Tr. 323: 24-4 n.p.).

With respect to other betting activity, the witness testified that in the fall of 1962 he made several bets on baseball games. (Tr. 326: 10-22; Tr. 327: 21-24). With respect to these baseball wagers he testi-

fied that he would call Las Vegas, identify himself, ask for the odds, that he would receive an answer and then place his bet. (Tr. 328: 19-12 n.p.). He testified that his usual bets on these games amounted to two or three hundred dollars. (Tr. 329: 16-17).

Still another pattern of betting activity between this witness and the appellant occurred in the spring of 1963 at a time when the witness was in New York. The record reflects that he phoned the Saratoga to bet on a prize fight, and that he lost the bet and that the loss was later part of a settlement previously referred to. (Tr. 341: 6-23; Tr. 342: 17-25; Tr. 343: 19-17 n.p.; Tr. 345: 9-17; Tr. 379: 1-19).

**(c) Testimony of James Lane, Credit Manager and Office Manager, Lilli Ann Corporation, San Francisco; Jerry Hathaway, Commercial Engineer, Central Telephone Company, Las Vegas; James Moriarty, Special Agent, Pacific Telephone Company, San Francisco; and Raymond A. Langlois, Federal Bureau of Investigation.**

In connection with the testimony of the witness Schuman, James Lane was called by the Government to identify and testify concerning records obtained from Schuman's place of business, the Lilli Ann Corporation, San Francisco. Government Exhibits (20) and (21) reflect that certain Las Vegas telephone numbers were used by the Lilli Ann telephone operator when phoning the appellant at the request of the witness Schuman. (Tr. 230-232; 240). Lane also identified Lilli Ann Corporation records reflecting charges for a pattern of calls made to the pay telephone in the Saratoga in Las Vegas during the fall of 1962. (Government Exhibits (17), (18), and (19); Tr. 222-223; 228-230).

Government Exhibits (2), (3) and (4), introduced through the witness Jerry Hathaway, established the existence of appellant's residential telephone service in Las Vegas, and the telephone numbers assigned to the Saratoga Sports Book in Las Vegas. (Tr. 39-41).

Through the witness Langlois the Government introduced Government Exhibit (25), which indicated an extensive pattern of calls from a San Francisco phone used by the witness Syufy to call the Saratoga Sports Book. (Tr. 403-407).

**(d) Testimony of Nathaniel Albert**

The testimony of Nathaniel Albert is particularly significant when considered in connection with that of the witness Syufy. Albert stated that he worked for the Saratoga for about an eight year period ending about September 1963. (Tr. 161: 17-21). Albert testified that the appellant operated sports betting at the Saratoga (Tr. 163: 14-16); that the appellant accepted and paid bets there (Tr. 164: 8-10); and that the appellant "handled the entire (sports) department." (Tr. 164: 16-18). He recalled that for a period the appellant may have had one assistant identified as an individual named Gross, and that he had no assistant prior to the employment of Gross as far as Albert could recall. (Tr. 164: 19-6 n.p.).

These facts indicate appellant's close connection with sports betting at the Saratoga. They explain and corroborate the relationship Lesly Cohen maintained with Raymond Syufy, Adolph Schuman, and other bettors. Moreover, the nature of the operation, when considered in the light of the testimony of

Albert and bettor witnesses indicates that the appellan alone transacted sports wagering business with such witnesses.

**(e) Testimony of Soll C. Drossman and Frank Hochfeld**

The testimony of the witnesses Drossman and Hochfeld, together with other testimony outlined clearly established that the appellant was engaged in an extensive illegal interstate wagering business. These witnesses were also very persuasive on the issue of appellant's criminal intent in dealing with bettors outside the State of Nevada. Thus, this testimony reflects his state of mind of the appellant in dealings with Adolph P. Schuman and Raymond Syufy.

Frank Hochfeld clearly established a pattern of betting on sporting events late in 1961 and early 1962. This testimony was strongly corroborated by the introduction of cashier's checks in settlement of his wagering activity (Government Exhibits (5), (6), (7), and (8); Tr. 303: 24-2). The testimony of this witness is also significant because he proved conclusively that the appellant was well aware of the Federal gambling statutes in 1961. In this regard the witness clearly stated that in 1961 the appellant advised him (Hochfeld) not to phone bets because it was unlawful for the appellant to accept them. (Tr. 296: 14-22; Tr. 297: 1-18; Tr. 298: 13-23; Tr. 300: 5-6, 18-22; Tr. 302: 21-13 n.p.; Tr. 304: 3-9). Though the appellant elected to inform the witness Hochfeld of the criminality involved in his activities, the record reflects that he chose not to discontinue his

subsequent relationship with Adolph P. Schuman, and that he did not inquire concerning Schuman's location. (Tr. 276: 4-10). He apparently chose to continue his subsequent illegal relationship with the witness Raymond Syufy also as the record indicates that Syufy was never questioned concerning his location. (Tr. 364: 19-22).

The Hochfeld testimony reflects a significant portion of the basis for the jury's conclusion that the appellant acted with a consciousness of guilt in his subsequent interstate wagering transactions with Adolph P. Schuman and Raymond Syufy.

The testimony of Soll C. Drossman indicated a clear pattern of interstate betting between the appellant in Las Vegas, and the witness Drossman in Tucson, Arizona. Drossman testified that during Labor Day weekend of 1961 he had a conversation with the appellant (Tr. 11: 10-12; Tr. 19: 13-16), and that it took place in the Saratoga Sports Book (Tr. 20: 1-16). Drossman testified that he asked for and received permission from the appellant to phone him from Tucson to place bets. He also stated that the appellant gave him a card with a number which he should use when calling him in Las Vegas. (Tr. 20: 20-6 n.p.; Tr. 90: 7-18). He testified that he thereafter called the number after returning to Tucson and asked for the appellant (Tr. 21: 7-9, 16-24; Tr. 22: 20-22); and that he called this number given to him by the appellant on more than one occasion. (Tr. 22: 23-25). He testified that he also phoned the number to place bets during the summer of 1962 while in Las Vegas. (Tr. 23: 8-16; Tr. 24: 1-11).

All settlements were thereafter made with the appellant personally either in cash on a weekly basis (Tr. 27: 17-22), or by mailing cashier's checks or registered mail to the appellant specifically. (Tr. 27: 11-16; Tr. 30: 5-7; Tr. 33: 9-14; Tr. 34: 9-13).

The witness' practice with respect to football bets was to receive the line from the appellant over the telephone before placing bets with the appellant. (Tr. 31: 15-24). When calling he would say, "Les, this is Soll from Tucson," and then would place his bet. (Tr. 32: 17-24). The record shows that appellant never inquired concerning Drossman's location, (Tr. 80: 20-25), or that he took steps to terminate his relationship with Drossman.

## STATUTE INVOLVED

Title 18, United States Code:

Section 1084 (a)—"Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

## QUESTIONS PRESENTED

1. Whether the affidavit filed by appellant's counsel on January 29, 1965, as a basis for a hearing on a motion to suppress was legally sufficient to warrant a hearing?

2. Was the evidence sufficient to show a knowing or intentional use of interstate wire communication facilities?

3. Did the Court err in its instruction to the jury on the issue of criminal intent?

4. Whether the phrase "engaged in the business of betting or wagering," in Section 1084(a), Title 18, United States Code, may be equated with the phrase, "engaged in the business of accepting wagers," in Section 4401(c), Title 26, United States Code.

5. Did the Court err in its instruction to the jury that every person is presumed to know what the law forbids and what the law requires to be done?

6. Whether the Court improperly limited the cross-examination of the witness Adolph P. Schuman?

7. Whether Count Seven of the indictment was made duplicitous by reason of information contained in the Amended and Corrected Bill of Particulars?

8. Did the Court err in the admission of testimony supplied by the witnesses Soll C. Drossman, Frank Hochfeld and Henry Wayne Stead?

## ARGUMENT

### I. The Affidavit Filed by Appellant's Counsel as a Basis for a Hearing on Appellant's Motion to Suppress was Legally Insufficient

#### A. *Appellant offered no* prima facie *showing that a mail watch utilized by the Government went beyond merely observing what was visible on the outside of mail addressed to the appellant.*

Mail covers or mail watches have proven to be an invaluable aid in the detection of crime over the years. In practice a postal employee merely observes the exterior of mail for the purpose of recording the name and address of the sender, the place and date of the postmark, and the class of mail. Mail is neither delayed nor opened and the content of the mail matter is not observed. The record discloses that only a mail watch of the type described was employed during the course of investigating appellant's interstate wagering activities. (R. 51-56).

The practice of conducting mail covers has received judicial approval in the case of *United States* v. *Costello*, 255 F. 2d 876, 881-882 (2nd Cir. 1958), *cert. denied* 357 U. S. 937, *reh. denied* 358 U. S. 858. In that case the question of the applicability of Sections 1701, 1702, and 1703 of Title 18, was raised in connection with the denial of a motion for a new trial on the ground of newly discovered evidence relating to an alleged illegal mail watch. After noting that the delay in delivering Costello's mail never amounted to more than one delivery, the Court stated:

> We do not think this comes within the proscription of Section 1701 which declares that

anyone who "knowingly and willfully obstructs or retards the passage of the mail" shall be guilty of a crime.

Nor do we think there has been any violation of Section 1702 which in pertinent part, declared it to be a crime for anyone to take any letter ". . . out of any post office . . . or which has been in any post office . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another . . . ." It is undisputed that the mail here in question was never taken "out of any post office" prior to delivery, or that it was ever opened as above stated. . . . We think this does not come within the prohibition against "taking" a letter or prying into another's secrets or business as used in the statute.

* * * *

Section 1703(a) penalizes any "Postal Service employee" who "unlawfully detains, delays, or opens any letter . . . which shall come into his possession . . . ." However, as we have held in interpreting that section, detention alone without proof that it was for an unlawful purpose does not constitute a violation of this section. (Citing authority).

* * * *

We conclude that the mail watch was not illegal.

Subsequently, in *United States* v. *Schwartz*, 283 F. 2d 107, (3rd Cir. 1960), cert. denied 364 U.S. 942, the mail watch procedure provided by postal regulations was again fully explored and it was specifically held

that such a procedure was not illegal and that it was not violative of any constitutional rights of the addressee. In the *Schwartz* case a mail fraud conviction was based solely upon evidence obtained through a mail watch.

On March 5, 1964, in the trial of Roy M. Cohn in the Southern District of New York, United States District Judge Archie O. Dawson ruled in an unreported decision that mail watches used during investigation were not a violation of the defendant's constitutional rights. *United States* v. *Roy M. Cohn*, Docket No. 63 Cr. 748, (S. D. N. Y., March 4, 1964).

While the Supreme Court has never passed directly on the question the Court strongly indicated in *Ex parte Jackson*, 96 U. S. 727, 733 (1877) that while sealed letters were protected by the Fourth Amendment, it would nevertheless be proper to examine the outside of such letters and to take cognizance of what appears thereon. The following language from the opinion is pertinent:

> [A] distinction is made between different kinds of mail matter—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, *except as to their outward form and weight*, as if they were retained by the parties forwarding them in their own domiciles. (Emphasis Supplied.)

In this case the mail watch employed by the Post Office Department was described in a detailed manner in three affidavits supplied by the Government with a Supplemental Memorandum filed in opposition to appellant's motion to suppress. (R. 49). These affidavits executed by Robert Lias, United States Postmaster, Las Vegas, Nevada, and mail carriers Harry White, and Richard Logan, Las Vegas, indicate clearly that normal Post Office procedures were followed in connection with the mail watch. (R. 51, 53, 55). The affidavits of Logan and White reflect that they individually were responsible for effecting the mail watch, and that in so doing, mail was not opened, nor was any attempt made to ascertain the contents of such mail. At no time did the mail watch result in their departing from the Post Office with mail after the time scheduled for such departure. The three affidavits indicate that the appellant never complained or commented to the three affiants concerning the delivery of appellant's mail.

Appellant's original motion to suppress filed on January 23, 1964, contained no affidavit in support of allegations relative to illegality in the conduct of the mail watch. (R. 11). More than a year later on January 29, 1965, counsel for appellant filed the affidavit upon which he now relies as a basis for allegations relating to alleged tampering with the mail. However, this affidavit alleges no evidentiary facts to indicate observation of the contents of appellant's mail.

Though appellant alleged no facts to warrant the calling of witnesses for a hearing on his motion to

suppress, the trial record clearly reflects that he was given wide latitude with respect to cross-examining Government witnesses concerning their mailings to the appellant. In this regard counsel for appellant cross-examined the witness Soll C. Drossman in an unsuccessful effort to establish that registered letters sent to the appellant by Drossman were opened by Government agents. The testimony of Drossman is devoid of any indication of irregularity. (Tr. 95: 1 to 97: 8).

Further unsuccessful efforts along the same line were made with the second Government witness, Henry Wayne Stead. (Tr. 120: 8-12; 149: 9-15). On redirect examination it was conclusively brought out that Government agents in no way indicated to Stead that they were aware of the contents of registered letters sent by the witness Stead to the appellant. (Tr. 138: 20 to 139: 21; Tr. 149: 19-22).

Apparently counsel for appellant realized that further interrogation would only have the effect of completely negating his unsupported allegations relating to tampering with the mails as the record discloses that the witnesses, Adolph P. Schuman, Frank Hochfeld and Raymond Syufy, were not cross-examined on the subject.

Appellant's brief alludes to the mail watch employed in this case as posing an interference to appellant's right to counsel under the Sixth Amendment of the United States Constitution. In this regard he cites the previously mentioned unreported opinion in the Roy M. Cohn prosecution in the Southern Dis-

trict of New York * and *Massiah* v. *United States*, 377 U. S. 201 (1964).

The record is devoid of any indication of interference with appellant's relationship with counsel. In the absence of a showing that appellant's rights were infringed there can be no basis for the application of such authority. Moreover, the inapplicability of *Massiah* v. *United States* is apparent. There the facts indicated the use of an electronic eavesdropping technique on an indicted defendant who had retained an attorney and pleaded not guilty. Incriminating statements made by the defendant in *Massiah* were overheard by authorities and used against him during trial. The Court held that Sixth Amendment guarantees were denied him because incriminating statements had been elicited from him in the absence of counsel.

*United States* v. *Roy M. Cohn* involved mail watches ordered by prosecuting attorneys after indictment of the defendant. In that case watches were instituted on mail of the defendant and his attorney. Though the Court questioned the use of such a technique on a known defense counsel after indictment, it was specifically held that no constitutional rights of the defendant were infringed.

Other authorities cited in appellant's brief do not relate to mail watches and are clearly not in point. *Hoover* v. *McChesney*, 81 Fed. 472 (Cir. Ct. D. Ky. 1897) related to a refusal to deliver mail to the plaintiff by reason of a statute giving the Postmaster Gen-

* Docket No. 63 Cr. 748, (S. D. N. Y., March 4, 1964).

eral administrative authority to withhold mail from individuals or companies conducting lotteries. In *McChesney* there was an actual detention and illegal seizure of the mail. Similarly *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902) related to a complete withholding of mail under administrative authority conferred by an act of Congress. The facts in *Pike* v. *Walker*, 121 F. 2d 37, (D. C. Cir. 1940), *cert. denied* 314 U. S. 625, related to the transmission of matter declared to be non-mailable by reason of being violative of federal mail fraud statutes. *Walker* v. *Popenoe*, 149 F. 2d 511 (D. C. Cir. 1945), related to the barring of obscene matter from the mails and the procedural steps which must precede such action, and *United States* v. *Halseth*, 342 U. S. 277, (1952), involved the construction of a criminal statute forbidding the mailing of letters, packages and postal cards "concerning any lottery" or similar scheme.

*Fixa, Postmaster, San Francisco, et al.* v. *Heilberg*, 381 U. S. 301 (1965),* cited in appellant's brief involved the construction of Section 305(a) of the Postal Service and Federal Employees Salary Act of 1962, which requires the Postmaster General to detain and deliver only upon the addressee's request, unsealed foreign mailings of "communist political propaganda." The Act as construed and applied was held to be unconstitutional since it imposed on the addressee an affirmative obligation amounting to an unconstitu-

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* Decided with *Lamont, dba Basic Pamphlets* v. *Postmaster General,* 381 U.S. 301 (1965).

tional limitation of the freedom of speech under the First Amendment. The decision in that case noted that the opinion rested "on the narrow ground that the addressee in order to receive his mail (had to) request in writing that it be delivered." Needless to say, such a procedure was not employed in this case.

In addition to the use of mail covers by the Postal Inspection Service in connection with mail fraud, and obscenity investigations, the Post Office utilizes the technique at the request of other Federal investigative agencies for the purpose of uncovering other forms of crime. The types of investigations wherein it has been helpful include espionage and sabotage cases, gambling, narcotics and smuggling, as well as others.

In summary the mail cover technique is a valuable investigative aid used in the detection of serious Federal crimes, and has been explicitly held not to be violative of any Federal statute or Constitutional right.

B. *Appellant offered no* prima facie *showing which would warrant a hearing into allegations of wiretapping.*

In order to secure a hearing on the admissibility of suspected evidence, it is incumbent upon the defendant, at the earliest possible time, to prove to the trial court's satisfaction that such evidence was illegally obtained. *Nardone* v. *United States*, 308 U. S. 338, 341-342, (1939). In referring to this defense requirement the following language was used by the Court in *Nardone*:

> To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial courts indulgence of inquiry into the legitimacy of evidence in the Government's possession . . . therefore claims that taint attaches to any portion of The Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury.

The accused has the burden of first proving that the prosecution has employed wiretapping before a hearing is warranted. *United States* v. *Coplon*, 185 F. 2d 629, 636 (2nd Cir. 1950), *cert. denied* 342 U. S. 920; *United States* v. *Goldstein*, 120 F. 2d 485 (2nd Cir. 1941), aff'd, 316 U. S. 114 (1942). Affidavits offered in support of such a motion must contain more than "sheer guess work." *United States* v. *Flynn*, 103 F. Supp. 925, 930 (S. D. N. Y. 1951), aff'd, 216 F. 2d 354 (2nd Cir. 1954), *cert. denied*, 348 U. S. 909, *petition for reh. denied* 348 U. S. 956. In *United States* v. *Weinberg*, 108 F. Supp. 567, 569 (D. D. C. 1952), it was held that, "mere conjecture," was not sufficient. The following language was used in the *Weinberg* case:

> The defendant's affidavits do not allege that there is, in fact, any evidence whatever that will be offered by the Government based on intercepted telephone messages. *There is an entire lack of definitiveness as to any particular interception . . . The defendant's conclusions have mere*

> *suspicions and innuendos as their premises.* This is not the "solidity" and affirmative proof necessary and therefore does not merit a hearing under the Nardone Rule. Courts need a reasonable assurance that the evidence challenged is tainted or is "a fruit of the poisonous tree"; mere conjecture will not suffice. (Emphasis added.)

In *United States* v. *Pardo-Bolland,* 229 F. Supp. 473, 475 (S. D. N. Y.), aff'd 348 F. 2d 316 (2nd Cir. 1964), cert. denied 382 U.S. 944 the District Court stated:

> The moving affidavit by defendant is so lacking in specific statements of evidentiary facts that it fails to raise an issue . . . The charges are so manifestly devoid of evidential support that they require neither an answer nor a hearing. The burden is upon the defendant to establish that his wires have been tapped. (Citing authority.) That burden requires allegations of evidentiary facts upon personal knowledge, or at least disclosure of the sources of the deponent's information and the ground for his belief to support a demand for a hearing.

Appellant appears to imply that he is entitled to a hearing by making more general assertions in affidavit form. It has been held that evidence in support of such a motion must be "shown with sufficient clarity or definitiveness to warrant the holding of a pre-trial hearing. . . ." *United States* v. *Frankfeld,* 100 F. Supp. 934, 939 (D. Md. 1951), aff'd, 198 F. 2d 679 (4th Cir. 1952); *United States* v. *Fujimoto,* 102 F. Supp. 890 (D. C. D. Hawaii 1952).

In *United States* v. *Casanova*, 213 F. Supp. 654, 656 (S. D. N. Y. 1963) the Court in commenting on the complete absence of any evidential material in support of a motion to suppress stated:

> If one were compelled (to have a hearing) under the circumstances here presented, then every defendant in a criminal case could make similar unsupported charges and with equal justification demand a hearing to have the Government disprove them.

In the case at bar appellant made no showing whatsoever to indicate the existence of wiretapping. Not a scintilla of evidence was submitted to the District Court for consideration. Moreover, the Government by the affidavit of Assistant United States Attorney, Frederick J. Woelflen, stated unequivocally for the record that wiretapping was not employed during the course of the investigation of appellant. (R. 28-30). Affidavits of the type filed here or similar thereto have been given weight in a number of cases. *United States* v. *Pardo-Bolland*, *supra*, at 475; *United States* v. *Casanova*, *supra*, at 657; *United States* v. *Weinberg*, *supra*, at 569; *United States* v. *Flynn*, *supra*, at 930; *United States* v. *Frankfeld*, *supra*, at 935-936.

Perhaps the most revealing facet of the record relative to appellant's allegations relative to wiretapping is disclosed in the complete absence of efforts to examine the Government agent in charge of the investigation of the appellant. This investigator, Special Agent Richard L. Budde, Intelligence Division, Inter-

nal Revenue Service, was called as a witness by the defense, and asked if he had been assigned to handle the investigation of the appellant for the Internal Revenue Service. Though questioned about another unrelated matter, he was not interrogated concerning the allegations raised by appellant in his motion to suppress. (Tr. 511D-511F.)

Subsequently, this same agent was called as a rebuttal witness by the Government (Tr. 511M); however, counsel for appellant again failed to interrogate Agent Budde concerning appellant's allegations. Presumably, counsel for appellant saw no reason to question the affidavit of Assistant United States Attorney Frederick J. Woelflen (R. 29), where he stated:

> Further, your affiant personally conferred with a Special Agent of the Intelligence Division of the Internal Revenue Service on February 6, 1964, who had investigated the alleged interstate gambling activities of the defendant in Las Vegas, Nevada, and your affiant was advised by this agent that the Internal Revenue Service did not engage in nor employ any wiretapping activities in securing investigative leads and other information which resulted in the indictment of the defendant.

The record does not reflect that counsel for appellant ever urged any further facts for consideration by the Trial Court. At no time during trial did he make any effort to supply evidence which would provide the basis for a hearing.

Appellant cites *Hoffritz* v. *United States*, 240 F. 2d 109 (9th Cir. 1956) in support of his argument for a

hearing. In *Hoffritz* an issue was clearly raised concerning a question of whether fraud and trickery were used by the Government to obtain permission to examine certain books, records and other documents. It was clear that the issue could not be resolved by an examination of the several rounds of supporting and opposing affidavits filed in that case. Here no question of fact was presented. *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961), another case cited by the appellant is similar to *Hoffritz* in that it involved an issue as to whether deception was practiced on a taxpayer in order to obtain records for a criminal tax prosecution. A number of factual details were alleged with respect to the conduct of the agents, including specific statements allegedly made by the investigating agents. The decision merely holds that a hearing should be held if issues of fact are raised.

We agree with appellant that a hearing must be held if a question of fact is posed, but mere speculations of counsel, denied in specific terms by Government affidavits, do not raise such an issue. If appellant's moving papers entitled him to a hearing then any defendant would be entitled to a hearing on his own speculative allegations.

**II. The Evidence Was Sufficient to Show a Knowing or Intentional Use of Interstate Wire Communication Facilities.**

In considering the evidence indicating that the appellant was aware of the interstate nature of telephonic communications with bettors it should first be noted that the testimony of the witness Hochfeld

clearly established that the appellant was fully aware of the criminality involved in taking bets over the telephone from points outside Nevada. Moreover, it was established clearly that the appellant had this knowledge in the fall of 1961, at or about the time Section 1084 was enacted. (Tr. 296: 14-22, 297: 1-18). Despite the foregoing, proof adduced from Government witnesses shows that the appellant never inquired as to the location of interstate bettors when they phoned him for the purpose of wagering. Moreover, it was clear that he did not attempt to discontinue his interstate pattern of betting with Adolph Schuman, Raymond Syufy, or others. Subsequent gambling transactions after the fall of 1961, and into 1962 and 1963, reflect this incriminating continuation of wagering. This collation of facts strongly indicates consciousness of guilt at the time of his telephone conversations with out-of-state bettors.

The record shows that Schuman was well known to the appellant as a San Francisco resident, one well established in business, and one which he was willing to carry on a credit betting arrangement with. These circumstances quite logically fall into the wide category of evidence from which the jury could infer knowledge of the location of his bettors. The logical inference is that the appellant knew the witness Schuman was calling from San Francisco where the defendant knew he resided and carried on a well known business. (Tr. 243-245). In connection with this point it should also be noted that since the defense made every effort to show that this witness was well known to the defendant, the jury could logically

assume that such an associate would have made known his location in Las Vegas, a city some hundreds of miles from San Francisco.* The absence of such conversation logically indicates the opposite fact, that Schuman was phoning from the San Francisco area. Moreover, appellant admits at page twenty-seven of his brief that "the evidence tended to show in the instant case that specific phone calls were, in fact, accepted by appellant from the Bay area and that these telephone calls had to do with bets and betting."

The procedure used by Mr. Schuman when calling the appellant also tends to reflect this guilty knowledge. When the witness phoned from his office, his secretary placed the call to the appellant specifically, thus circumstantially indicating to the appellant that the calls emanated from the witness' office in the City of San Francisco. (Tr. 203: 10-12; 203: 19-5 n.p.; 205: 1-9). In placing calls to the appellant from his home in Hillsborough, California, the witness Schuman testified that he would call him specifically and that he did not dial direct. (Tr. 205: 10-17). The jury could well have inferred that the usual procedure with respect to person-to-person calls was followed.

An analysis of the testimony of this witness reveals Schuman's testimony to be particularly convincing. Here we are dealing with an experienced businessman well known to the appellant for many years. His demeanor and manner of testifying enhanced the value of his testimony and added weight to it. Though indi-

* Appellant's Opening Brief, p. 31.

cating a slight reluctance to testify against the individual he placed his numerous sports bets with, he nevertheless testified fully concerning Counts Seven and Nine. (Tr. 273: 19-14 n.p.; 274: 15-21; 274: 22-4 n.p.; 276: 15-5 n.p.; 258: 25-2 n.p.; 209: 7-6 n.p.).

It can only be added that any question concerning the credibility of this witness and others was properly one for members of the jury. In this regard attention is invited to the Court's language in *United States* v. *Gulotta*, 29 F. Supp. 947, 950 (D. C. W. D. Missouri 1939), *rev'd on other grounds* 113 F. 2d 683:

> Certainly when facts are proved from which only one conclusion normally would be drawn (and 99 times out of one hundred it would be right) there is substantial proof of that conclusion.

In *Holland* v. *United States*, 348 U. S. 121, 138-139, (1954) the Supreme Court referred to the latter principle by noting that though the Government must prove every element of the offense charged beyond a reasonable doubt, it need not do so to a mathematical certainty.

At various points in his brief, counsel for the appellant infers that wagers with the witness Schuman were bets between old friends. He suggests that the bets were not taken seriously or that the fact they knew each other for such a long period excludes their bets from the terms of Section 1084(a). It is not the intention of the Government to extend discussion of this point unnecessarily. It is merely pointed out that the proof shows that the appellant operated a gambling

establishment, and an extensive illegal interstate gambling business, that he supplied expert wagering information on which bettors relied, and that all of the witnesses settled their gambling accounts with the appellant.

The operation described by the witnesses was clearly the operation of a bookie and oddsmaker. Moreover, the bets made were large bets, particularly those of the witnesses Schuman, Syufy, and Hochfeld, and they were numerous in number. (Tr. 266; Tr. 335-336; Tr. 285-288). They may have known each other well but this can be of no significance inasmuch as they would have had to know each other well to carry on illegal credit wagering transactions. Indeed it would have been unusual if they were not well acquainted with each other. On the basis of the foregoing it is submitted that the relationship of the witness Schuman to the appellant was simply one of bettor and bookie and well within the terms of Section 1084(a).

A similar pattern exists with the witness Syufy. The nature of appellant's close association with this witness is reflected in their extensive credit betting transactions. The jury would have had a firm basis for concluding that the appellant was well aware of Syufy's home and residence location. (Tr. 365: 6-15; 366: 8-16; 367: 4-5 n.p.; 346: 6-10).

Similar patterns also appear with respect to the witnesses Drossman and Hochfeld. There was proof with respect to each tending to indicate that the appellant was aware that they resided outside of Las Vegas and outside of the State of Nevada. This proof when considered together with the appellant's con-

sciousness of guilt manifested through Frank Hochfeld's testimony, the failure to inquire concerning the location of witnesses, the unusual brevity of the telephone conversations involved as related by the witness Syufy, and the overwhelming proof that the appellant supplied odds and carried on an extensive wagering business, offers substantial evidence that he was well aware of the interstate aspects of calls placed to him by the witnesses Schuman and Syufy in connection with transactions described in Counts Seven and Nine.

The Record also reflects clearly that the witness Syufy identified the appellant as the person with whom he was dealing at the Saratoga. The fact that he did not recognize the telephone voice he spoke to when phoning the Saratoga is immaterial in light of the clear and convincing testimony that this witness bet with the Saratoga over interstate facilities, that the only person he knew at the Saratoga was the appellant, and in view of the fact that he settled his wagering bills with the appellant only. It would be stretching credulity to say that the interstate betting of this witness was carried on with anyone other than the appellant. It must be noted that this witness was obviously hostile and biased. Despite this fact, Raymond Syufy did testify sufficiently to block out any possibility that he was dealing with anyone at the Saratoga other than the appellant.

At page twenty-one of appellant's brief it is asserted that appellant could have accepted "hundreds or even thousands of telephone calls concerning the subject of betting on the telephone within the State of

Nevada." However, it is noted in this regard that Regulations promulgated by the Nevada Gaming Commission and Nevada Gaming Control Board specify that all bets accepted by race and sports books establishments in Nevada must be on an "over-the-counter basis, for cash . . . ." (Regulation 5.020). Presumably appellant was aware of the illegality of his conduct under Nevada law as well as the applicability of the prohibitions contained in Section 1084(a) of Title 18 United States Code. This additional factor also tends to indicate the absence of innocence in connection with appellant's interstate wagering methods.

**III. The Trial Court Did Not Err in Its Instruction to the Jury on the Issue of Criminal Intent.**

Appellant questions the Trial Court's instruction to the jury relating to the subject of criminal intent. The portion questioned is set forth herein for the convenience of the Court:

> Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there can be no eye witness account of a state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the evidence in the case leads the jury to a different

> or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one standing under like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused. (Tr. October 5, 1965, pp. 43-44).

It is contended that reversible error is involved in the portion of the quoted instruction which states that it is reasonble to *infer* that an accused intends "all the natural and probable consequences" of his acts. Appellant asserts that the language used in this regard allowed the jury to presume appellant's guilty knowledge concerning the character of the interstate calls which he received.

It is extremely difficult to follow appellant's reasoning with respect to this point, particularly in light of the last sentence of the intent instruction, which specifically informed the jury that the Government retained the burden of proving that "the defendant knew that the use of . . . wire communication facilities for the transmission in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event was contrary to law." The instruction contained in the sentence last quoted was specifically requested by the appellant. (Tr. October 5, 1965, p. 44).

It should be noted that the "natural and probable consequences" portion of the instruction given in this case was substantially the same as one approved in *Sherwin* v. *United States*, 320 F. 2d 137 (9th Cir.

1963), *cert. denied* 375 U.S. 964, *petition for reh. denied* 376 U. S. 946. The specific language used in *Sherwin* is as follows:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Despite the striking similarity of the quoted instruction to that given in this case, appellant argues that the instruction is more like that condemned in *Bloch* v. *United States*, 221 F. 2d 786 (9th Cir. 1955), *reh. denied* 223 F. 2d 297. The dissimilarity in the two instructions is immediately apparent inasmuch as the instruction in *Bloch* provided that: "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

The *Sherwin* case specifically distinguished the two instructions set out, noting that there are definite differences. In *Sherwin* the instruction was general in nature, and the word "infer" was used rather than "presumption." The Court also noted that the instruction in *Bloch* was specific in that it was given in terms of the facts of that case. Here, as in *Sherwin*,

specific intent instructions were actually given to the jury and particular facts were not singled out as a basis for the jury to draw an inference of guilty intent.

The "natural and probable consequences" instruction given in this case is approved in large measure by the following language in *Cramer* v. *United States*, 325 U. S. 1, 31 (1945):

> Since intent must be inferred from conduct, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural and probable consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.

The principle is also enunciated in *United States* v. *Patten*, 226 U. S. 525, 543 (1913), and in *Agnew* v. *United States*, 165 U. S. 36, 53 (1897). Appellant disregards the cited authorities and then through a tortuous process of reasoning endeavors to apply the *Bloch* decision and other related authority to the facts in this case.

In this regard *Morissette* v. *United States*, 342 U. S. 246 (1951) is cited in support of his contention. However, in *Morissette*, unlike this case, the issue of criminal intent was erroneously withdrawn from the jury. In that case a presumptive intent instruction relative to the mere act of taking spent bomb casings from a Government bombing range precluded the jury from considering whether from all the evidence the defendant was guilty of a theft of Government property. Other authorities cited by appellant do not reflect the

pertinent law in this Circuit relative to the instruction given. *Sherwin* v. *United States, supra; Legatos* v. *United States,* 222 F. 2d 678 (9th Cir. 1955); *Bateman* v. *United States,* 212 F. 2d 61 (9th Cir. 1954). Moreover, the authorities cited by appellant on this point relate to the crime of willfully attempting to defeat or evade payment of income taxes, which crime necessarily involves proof of a negative. In such cases proof of specific intent is unusually significant by reason of the unique burden of proof imposed upon the Government. However, here we are dealing with the performance of affirmative criminal acts prohibited by law, rather than the omission to perform an act as required by law.

**IV. Authorities Pertaining to Section 4401(c) of Title 26 United States Code Relating to the Definition of Persons Liable for the Wagering Excise Tax Are Not Relevant for the Purpose of Interpreting Substantially Different Statutory Language Contained in Section 1084(a), Title 18 United States Code.**

Appellant argues that Section 1084(a) of Title 18 United States Code should be construed in a manner which would preclude prosecution of a substantial number of those engaged in the business of betting or wagering. This result was necessarily implied in jury instructions prepared by appellant to the effect that Section 1084(a) should be narrowly and strictly interpreted so as to make it applicable only to those persons who are proven to be principals in gambling operations. To reach the conclusion that the denial of such requests to charge the jury was error, appellant argues that Section 1084(a) should be restricted and

limited by authorities construing the phrase, "engaged in the business of *accepting* wagers," as the latter phrase, is used in Section 4401(c) of the Internal Revenue Code. Appellant's contention is not supported in the legislative history of Section 1084(a), and it would contradict pertinent case law on the subject. Moreover, there is no evidence in the case indicating that any of the Government witnesses ever dealt with the appellant other than as a principal.

In *Kelly* v. *Illinois Bell Telephone Company*, 210 F. Supp. 456 (N. D. Ill. 1962), aff'd, 325 F. 2d 148, Section 1084(a) was construed in connection with an injunction action brought against the Illinois Bell Telephone Company, which company had acted to halt telephone service under the provisions of Section 1084(d). The action of the Telephone Company followed receipt of notification from the United States Department of Justice that a publishing firm operated by the plaintiff was engaged in the business of receiving and transmitting gambling information in violation of law. At page 466 of the opinion the Court thoroughly discusses the applicability of Section 1084 (a) to the publications of the plaintiff and uses the following pertinent language:

> Examination of the language of the section (Section 1084(a)) as well as its legislative history indicates beyond any doubt that Congress did intend to reach the activities of persons other than those directly accepting bets or wagers. There is considerable testimony in the hearings with respect to the complex nature of interstate gambling or sports events, particularly horse

> races, and the variety of activities involved over and above the mere receipt of bets from individuals.

Though the opinion notes that the conduct of the plaintiff did not constitute a violation of Section 1084 (a), it clearly recognized that it was the intention of the Congress to reach the activities of persons "engaged in the business of betting or wagering" other than bookies operating as principals only.

The phrase in question is set forth in Section 1084 (a) of Title 18, United States Code without qualification or condition. In *United States* v. *Smith*, 209 F. Supp. 907, 918 (U. S. D. C. E. D. Ill. 1962), the phrase was specifically construed and it was held that it is clear and unambiguous and that it may readily be understood by a simple reading of Section 1084. The words were characterized as being within the ordinary understanding and as such may be given their usual and accepted meaning. The instruction of the Trial Court on this point was in accord with the holding in *Smith*.

It is noted that no case annotated under Section 1084 contains authority for construing the phrase to apply to principals only, as counsel for the defendant suggests. It should also be noted that absent a specific congressional intent to include principals only, the words "engaged in business" should be given their ordinary meaning; and one who is occupied or employed in a business is "engaged" in it. *Lumber Mut. Casualty Ins. Co.* v. *Stokes*, 72 F. Supp. 463, 467 (D. C. S. C. 1947), rev'd on other grounds 164 F. 2d 571 (4th Cir. 1947).

The Trial Court's instruction as to the purpose of Section 1084(a) properly noted that the congressional intent of the statute was to assist the various states in the enforcement of their laws pertaining to gambling, bookmaking, and to aid in the suppression of organized gambling activities. (Tr. October 5, 1965, p. 40). *United States* v. *Yaquinta*, 204 F. Supp. 276, 279 (U. S. D. C. West Va. 1962). The proposed construction would diminish the assistance and suppression contemplated so as to make both insignificant.

That such a result would follow is inferred in appellant's brief at page thirty-four where it is noted that the legislative history of Section 1084(a) indicates that the measure was enacted because the wagering excise tax laws have proven to be a disappointment from the standpoint of curbing gambling activity. This factor alone indicates that the Congress anticipated Section 1084(a) to be more effective than the wagering excise tax statutes.

The difference in terminology used in the two sections is apparent. That is the phrase, "being engaged in the business of wagering," is broader in scope, than the more limited phrase, "engaged in the business of accepting wagers." Moreover, the latter is necessarily unique and distinct, by reason of the fact that taxing statutes are based upon considerations either not desirable or needed in other criminal statutes. With regard to the wagering excise tax, it should be noted that it was passed and constitutionally upheld as a revenue measure and not for other purposes. *United States* v. *Calamero*, 354 U. S. 351, 358 (1956); *United States* v. *Kahriger*, 345 U. S. 22, 28 (1953), *petition for reh. denied* 345 U. S. 931.

The difference in construing the federal wagering excise statutes, as distinct from gambling statutes, is vividly depicted in the following language in the specially concurring opinion of Circuit Judge Cameron in *Edwards* v. *United States*, 321 F. 2d 324, 327 (5th Cir. 1963)*:

> It cannot be mentioned too often that prosecutions such as these which we are reviewing are prosecutions for the violation of federal taxing laws, not for the violation of gambling laws, and, "in construing [the statutes] we would not be justified in resorting to collateral motives or effects [a congressional desire to suppress wagering] which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt. . . . In short, whether one gambles or not is of no concern to the federal government, except insofar as the taxing power is involved.

It is perhaps these limiting elements inherent in the wagering excise tax statutes which led to disappointment in their utilization as effective prosecutive tools to curb gambling activities. To engraft such weaknesses into Section 1084(a) as appellant suggests would clearly attenuate that provision and frustrate the primary objective of the Congress. It is submitted that since appellant's proposed instructions relative to "being engaged in the business of betting or wagering" erroneously limited the phrase to principals only, the Trial Court did not err in rejecting them.

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* Reversed *en banc* on other grounds, 334 F. 2d 360 (5th Cir. 1964), *cert. denied*, 379 U. S. 1000.

Point V of appellant's argument concerning "social wagers," is closely related to the preceding discussions. It is asserted that defense instructions numbered eleven and seventeen should have been given to the jury to distinguish between "social wagers," and "business wagers." (Tr. October 5, 1965, pp. 50-52). However, both requests were erroneous and therefore properly denied.

Proposed instruction seventeen relates to factors which determine whether a wager is "taxable," and also contains language indicating that Federal wagering excise tax statutes are not applicable to the "social or friendly type of bet." Such an instruction would have been misleading and confusing in this case, based as it is on Section 1084(a). It should also be noted that both instructions would have had the effect of obfuscating the Court's charge with respect to the phrase, "being engaged in the business of betting or wagering" as set forth in Section 1084(a), in that both requests allude to the "business of *accepting* wagers," which language is essentially different from that contained in Section 1084(a).

Throughout appellant's brief an effort is made to characterize the appellant's relationship to his bettors in social terms. However, the evidence in the case clearly reflects that the appellant was engaged in the legal and illegal business of wagering on a full-time basis. The only testimony cited by appellant in this regard is that Adolph P. Schuman was known to the appellant for approximately thirty years. However, it is evident that a gambler must know

his customers in order to maintain a credit wagering relationship with them.

It is true that Section 1084 was not designed to be applicable to isolated acts of wagering by individuals not engaged in the business of wagering. However, this burden of proof was accurately described by the Trial Court, and thereby precluded the possibility of finding guilt without first determining that the appellant was engaged in the business of wagering.

The legislative history of Section 1084 clearly indicates that the purpose of the legislation was to curb the activities of the professional gambler. However, it also notes that the effect of the statute would be seriously attenuated if the professional gambler were allowed to escape prosecution by characterizing his gambling business as "social wagering." In this connection the testimony of former Attorney General Robert F. Kennedy before the Senate Committee on the judiciary is particularly pertinent.*

> Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of the legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any prosecution by saying, as one of the largest layoff bettors in the country has said, "I just like to bet. I just make social wagers."

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* S. Report No. 588, to accompany S. 1656, 87th Congress, 1st Session.

**V. The Court Did Not Err in Its Instruction to the Jury That Every Person Is Presumed To Know What the Law Forbids and What the Law Requires to be Done.**

Appellant notes that the statute forming the basis of his conviction was only recently enacted by Congress and from this infers that it was error to instruct that everyone is presumed to know the law. Section 1084 was enacted on September 13, 1961. The acts charged in Counts Seven and Nine of the indictment occurred a year later during the football season of 1962. Moreover, there was positive proof introduced through the testimony of Frank Hochfeld that on or about the date of enactment the appellant was specifically aware of the criminality involved in his use of interstate wire communication facilities for wagering purposes. (Tr. 296-304).

In support of his position on this point he cites *Edwards* v. *United States*, 321 F. 2d 324, (5th Cir. 1963). However, the cited case was subsequently reversed *en banc*. *Edwards* v. *United States*, 334 F. 2d 360, *cert. denied* 379 U. S. 1000. The second *Edwards* opinion contains a thorough evaluation of the presumption in question. That case involved a prosecution under Section 7203 of Title 26, United States Code for wilfully failing to register for and pay gambling excise taxes as required by Sections 4411 and 4412 of Title 26, United States Code. The Court held that a rebuttable presumption of knowledge of the law exists. Interestingly, the holding in *Edwards* related to a crime involving the wilful *failure* to comply with specific duties imposed by statute. The opinion notes

that in such cases a showing of ignorance of the law would have been a complete defense. Here the charge involves the performance of an affirmative act and ignorance of the law would not be available as a defense. The following language at page 367 of the second *Edwards* opinion reflects the basis for the holding:

> Where the law is plain, definite, and well settled, and any want of knowledge of its requirements is a fact resting peculiarly within the knowledge of the defendants, when the Government has established its case in all other respects, the burden of adducing *some* evidence to rebut the presumption of such knowledge rests on the defendants. A mental state being involved, the presumption of knowledge of the law is analogous to the presumption of sanity . . . (Citing authority).

The principle outlined and the instruction given in this case are supported in a number of well-known authorities. *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 68 (1909); *Turf Center, Inc.* v. *United States*, 325 F. 2d 793, 797 (9th Cir. 1963); *Elwert* v. *United States*, 231 F. 2d 928, 937 (9th Cir. 1956); *Finn* v. *United States*, 219 F. 2d 894, 899-900, (9th Cir. 1955), *cert. denied* 349 U. S. 906.

### VI. Appellant's Cross-Examination of the Witness Adolph P. Schuman Was Not Improperly Limited.

Counsel for the appellant refers to what he terms a denial of his right to cross-examine the witness Schuman for the purpose of raising the question of a grant

of immunity. The record reflects clearly that counsel was given opportunities to inquire into this question, that he did unsuccessfully pursue such inquiry, and that while doing so he improperly attempted to read into the record a memorandum of an interview prepared by an Internal Revenue Agent in connection with an interview of the witness Schuman and his attorney. The memorandum was not signed, approved, or adopted by the witness Schuman, nor had he ever seen it.

The transcript reflects the following ruling of the Court relative to the statement in question:

> THE COURT: All right, you can ask from it a question if you have something specific, did this occur or that occur, but Mr. Schuman isn't responsible for the preparation of this document. (Tr. 268: 23-1 n.p.).

After being permitted to inquire fully into the subject of immunity and receiving no satisfaction from the witness, counsel for appellant attempted to read the statement. (Tr. 269: 8-21). The Court then stated:

> THE COURT: You can ask him from that statement what occurred at the meeting and get his statement of what occurred there, if it is relevant to any testimony that is before us. . . . (Tr. 270: 20-23).

Counsel then fully cross-examined the witness again and received no satisfaction. (Tr. 270: 25 to 272: 24). Subsequently at the conclusion of the trial the Government and counsel for appellant reached a stipulation concerning this point. The record reflects the following in this regard:

MR. FOSTER: It is my understanding that counsel will stipulate that on July 24, 1963, at San Francisco, California, in the office of Mr. Henry Robinson, Attorney at Law, in the presence of Mr. Henry Robinson, Mr. Adolph Schuman and Mr. L. H. Miller, that Mr. Schuman stated as follows:

Both Mr. Schuman and his attorney assured me that given the proper immunity, any information which they might have relating to our inquiry will be given completely and truthfully.

MR. KEENEY: I would so stipulate, your Honor. (Tr. October 5, 1965, p. 511L).

It is clear that the Court in no way interfered with appellant's right to cross-examine the witness Schuman on this point. Moreover, the information contained in the statement in question, though not properly elicited during cross-examination, was introduced by stipulation.

**VII. Count Seven of the Indictment Was Not Duplicitous.**

Appellant contends that an otherwise valid count in an indictment may become duplicitous by reason of information contained in a bill of particulars. There is no authority for such a novel conclusion of law. In fact it is well settled that an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form. *Russell* v. *United States*, 369 U. S. 749, 770-771 (1962); *Stirone* v. *United States*, 361 U. S. 212, 217 (1959); *Ex parte Bain*, 121 U. S. 1 (1887).

In this case appellant was supplied with the particulars that he specifically requested relative to Count

Seven for the purpose of aiding him to prepare his defense, prevent surprise, and to preclude the possibility of a second prosecution for the same offense. He now appears to be complaining that he was given an excess of information, or that there was an excess of evidence to prove Count Seven of the indictment.

The Seventh Count provided that during the football season of 1962, appellant being in the business of betting and wagering utilized interstate wire communication facilities to transmit information for the purpose of assisting in the placement of a wager on a San Francisco Forty-Niner football game. The Amended and Corrected Bill of Particulars apprised the appellant that this Count would be established by showing that the offense occurred during a number of telephone calls with the witnesses Schuman and Syufy. (R. 34-35).

The rule on duplicity in the Ninth Circuit has been aptly stated in *Empire Oil & Gas Corporation* v. *United States,* 136 F. 2d 868, at 872:

> Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way. *Duplicity may be applied only to the result charged, and not to the method of its attainment.* (Emphasis supplied).

In *Travis* v. *United States,* 247 F. 2d 130, 134 (10th Cir. 1957)*, the rule of duplicity is stated as follows:

> "Duplicity" in an indictment generally means the charging of two or more separate and distinct

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* *Rev'd on other grounds* 364 U. S. 631 (1961).

> offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose.

The rule stated is also expressed in a number of other authorities. *United States* v. *Lennon*, 246 F. 2d 24, 27, (2nd Cir. 1957), *cert. denied* 355 U.S. 836 (1957); *Hanf* v. *United States*, 235 F. 2d 710, 715, (8th Cir. 1956), *cert. denied*, 352 U. S. 880 (1956); and *Mellor* v. *United States*, 160 F. 2d 757, 762, (8th Cir. 1947), *cert. denied* 331 U. S. 848.

In *Hanf* the following language was used with respect to a count charging conduct embracing a number of acts which individually might have been made the subject of separate counts:

> Certainly, any similar prosecution by the government against this appellant for a violation committed at any time between the dates indicated in Count one of the indictment would be a prosecution for the same offense, and would be promptly dismissed. (235 F. 2d at 715).

In *Mellor* the Court noted that:

> We know of no rule that renders an indictment duplicitous because it charges as one joint offense a single completed transaction instead of charging in separate counts as many offenses as the evidence at the trial might conceivably sustain. (160 F. 2d at 762).

The foregoing authorities indicate that duplicity is not created by the mere fact that the Government might have made each separate telephone call by each bettor a separate count. The offense arose out of appellant's illegal wagering business, and the method of pleading inured to the benefit of the appellant.

In *Korholtz* v. *United States*, 269 F. 2d 897, (10th Cir. 1959), *cert. denied* 361 U. S. 929, a corporate employer paid approximately $2,300 to a labor union representative in violation of the Taft Hartley Act. The amount was paid in thirteen separate transactions. The union official was charged in a single count with the aggregate amount received. The Court rejected the duplicity contention and noted that:

> The cases reveal that a complaint of duplicity is rarely made when but a single statutory prohibition is involved since the effect of joining several violations as one redounds to the benefit of defendant.
>
> * * * *
>
> The trial court committed no error in admitting evidence as to all payments made to the bank and in rejecting appellant's proposed instructions that the jury must limit its consideration to only the first of the series of payments made. The defendants were charged with a single offense and the government had no burden nor duty to limit its proof to or elect to stand upon a single transaction. (269 F. 2d at 901).

The indictment under consideration here clearly charged only one offense. Appellant should not be allowed to complain that proof of this offense was greater than that contemplated, particularly in this situation where he was apprised of the proof before trial.

Counsel for appellant takes the position that the testimony of the witness Syufy does not support the allegations of the indictment in any particular. It is abundantly clear from a review of the testimony of

this witness that the position taken has no basis. The testimony was admissible to prove allegations in Count Seven. This testimony was also relevant and properly submitted to the jury in connection with that general element of proof requiring that the Government establish that the defendant was engaged in the business of betting and wagering. It was also material and relevant with respect to the defendant's criminal intent in dealing with bettors. As previously noted herein in connection with discussion of the testimony of the witnesses Schuman and Syufy, there was sufficient specific evidence relating to Count Seven to warrant submission of their testimony to the jury.

At page forty-two of appellant's brief a number of authorities are cited for the purpose of inferring error in the submission of the testimony of Schuman and Syufy to the jury. However, in the cases cited error was found because of the submission of an erroneous legal theory for consideration in the evaluation of evidence. Here there is no question of an erroneous charge in connection with the testimony of these two witnesses. Their statements were properly submitted to the jury for evaluation, and the mere fact that appellant is not aware of the weight attributed to the evidence cannot be significant. The jury might have rested its verdict with respect to Count Seven on the testimony of Schuman or Syufy, or both.

**VIII. The Trial Court Did Not Err in Admitting the Testimony of Soll C. Drossman, Frank Hochfeld and Henry Wayne Stead.**

The introduction of the testimony of Soll C. Drossman, Frank Hochfeld and Henry Wayne Stead was properly allowed in this case to show that the appellant was an individual "engaged in the business of betting or wagering" within the meaning of Section 1084(a). It is well established that where proof of other criminal acts aids in, or is a necessary aspect of, establishing the crime charged, such evidence is admissible. *Schwartz* v. *United States*, 160 F. 2d 718, 721, (9th Cir. 1947); *Gianotos* v. *United States*, 104 F. 2d 929, 932-933, (9th Cir. 1939). The testimony was also admissible to show the intent and knowledge of the appellant in his dealings with Adolph P. Schuman and Raymond Syufy over interstate telephone communication facilities. *Reid* v. *United States*, 334 F. 2d 915, 918, (9th Cir. 1964); *Stewart* v. *United States*, 311 F. 2d 109, 112, (9th Cir. 1962); *Corey* v. *United States*, 305 F. 2d 232, 239, (9th Cir. 1962), *cert. denied* 371 U. S. 956 (1962). It is also well settled that subsequent similar acts may have probative value. *Anthony* v. *United States*, 256 F. 2d 50, 53, (9th Cir. 1958); *United States* v. *Blount*, 229 F. 2d 669, 671, (2nd Cir. 1956). The testimony of each of these witnesses was legally sufficient for the two purposes outlined.

In this case proof of appellant's wagering business was essential. It would not have been possible to establish the offense charged without showing elements of his gambling activities. In a similar man-

ner the evidence of other interstate gambling transactions was circumstantially probative in determining that the appellant was aware of the interstate features of dealing with customers located outside the State of Nevada. In this regard it is noted that the testimony of the witness Hochfeld was admissible for the additional reason that it specifically established appellant's knowledge of the criminality involved in his activities. Appellant's brief appears to ignore this conclusive proof of guilty knowledge, as well as other proof of knowledge of the location of bettors.

The testimony of the witness Stead was stricken by the Court on motion of the appellant. An appropriate instruction to disregard Stead's testimony was thereafter given to the jury. (Tr. October 5, 1965, pp. 511A-511B; Tr. October 5, 1965, p. 35). However, an examination of legal authorities cited indicates that it would not have been prejudicial to submit Stead's testimony to the jury as being admissible on the question of intent and knowledge, as well as in further proof that appellant was engaged in the business of betting and wagering. The testimony of the witness Drossman was admissible to show appellant's complicity in a similar interstate wagering relationship conducted between Las Vegas, Nevada, and Tucson, Arizona. The testimony of the witness Hochfeld was admissible to show direct proof of appellant's knowledge, and also appellant's complicity in another interstate wagering relationship conducted between Las Vegas and Portland, Oregon.

Appellant cites six cases in support of his theory concerning the testimony of these three witnesses.

*Kraft* v. *United States*, 238 F. 2d 794, (8th Cir. 1956), clearly recognizes the principles of law which allows proof of other crimes on the question of intent. However, in *Kraft* the proof of other acts amounted to unsupported accusations consisting of letters of complaint printed in a newspaper. *Paris* v. *United States*, 260 Fed. 529, 531, (8th Cir. 1919), involved proof of an arrest in another district in connection with a narcotics offense. These cases cannot be equated with the instant prosecution where the proof of other interstate wagering activity was clear, certain and convincing.

*Mora* v. *United States*, 190 F. 2d 749, (5th Cir. 1951), is not in point on the question, and the language quoted in appellant's brief as emanating from this decision does not appear to form a part of that opinion. *Wiley* v. *United States*, 257 F. 2d 900, (8th Cir. 1958), involved the affirmance of a Mann Act conviction. In *Wiley* reputation evidence that the defendant was a "panderer" was introduced and then stricken. The Court held that this did not constitute error. Moreover, the decision recognized the probative value of other acts of transportation, as well as acts of physical harm perpetrated on the defendant's victims. *Sang Soon Sur* v. *United States*, 167 F. 2d 431 (9th Cir. 1948) is not in point, inasmuch as the error related to proof of a narcotics offense in an income tax evasion prosecution. Similarly, *Boyd* v. *United States*, 142 U. S. 450 (1892) would not be pertinent since it involved evidence of a defendant's complicity in certain robberies to prove a murder charge.

## CONCLUSION

Appellant has established no legal or evidentiary basis for a hearing on his pretrial motion to suppress and other contentions raised relating to rulings of the Trial Court are without merit. Evidence at the trial established clearly that while in Las Vegas, Nevada, appellant maintained wagering relationships over interstate telephone facilities with bettors in San Francisco, California; Portland, Oregon; and Tucson, Arizona, and that he regularly conducted wagering activity in the City of Las Vegas, Nevada, in a gambling establishment known as the Saratoga Sports Book. In connection with the San Francisco facet of appellant's wagering business it was established that appellant performed the acts described in Counts Seven and Nine of the indictment. On the basis of the foregoing it is submitted that the conviction should be affirmed.

Respectfully submitted,

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## Certificate of Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Louis Scalzo
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